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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

PABLO CUELLAR URIBE,

Defendant and Appellant.

2d Crim. No. B203195
(Super. Ct. No. PA056455-01)
(Los Angeles County)

Appellant was convicted by jury of driving under the influence of alcohol or drugs (count 1; Veh. Code, § 23152, subd. (a)) and driving with a blood alcohol content (BAC) of 0.08 percent or higher (count 2; Veh. Code, § 23152, subd. (b)). In a bifurcated proceeding, the trial court found true the allegations that appellant had three alcohol-related prior convictions within the meaning of Vehicle Code sections 23550 and 23550.5. The prior convictions elevated his offense to a felony.

The court imposed the mid-term of two years on count 1 and stayed the sentence on count 2 pursuant to Penal Code section 654. Appellant claims the trial court erred in denying his motion for a mistrial based on the fact that the

jurors may have seen him in custody. He claims he was prejudiced by the court's failure to hold a hearing to determine what the jury witnessed. We affirm.

FACTS

On April 23, 2007, at approximately 1:00 a.m., Highway Patrol Officer Jeritt Greer was called to the scene of an accident. He saw an overturned 1992 Chevrolet blocking an onramp to the southbound 5 freeway. Appellant was standing next to the car and smelled strongly of alcohol. His eyes were red and watery and his speech was slurred. He performed poorly on the field sobriety tests that Greer administered. A vehicle check confirmed that appellant was the registered owner of the car and Greer arrested him for driving under the influence of alcohol. A blood sample later reflected a BAC of .11 percent. The parties stipulated that appellant's BAC would have been between .11 and .13 percent at the time he was driving.

DISCUSSION

During voir dire, the jury was called into the courtroom before appellant was seated at the counsel table. The bailiff opened the door to bring appellant out of lock-up, and saw that the jurors had been seated. He immediately closed the door and the trial court asked the jurors to step into the hallway. The court went on the record to explain what had occurred.

Defense counsel stated that, while the jury was seated, the door to the lockup opened to reveal appellant standing with two sheriffs, in full view of the twelve jurors in the jury box, although he was not visible to the other prospective jurors in the courtroom. The trial court disagreed, indicating that the door opened partway and only the bailiff was visible in the doorway. Appellant was behind the bailiff, so could not be seen by the jurors. The court stated that the bailiff immediately realized the jury was in the courtroom and closed the door. Defense counsel again disagreed, arguing that he was sitting closer to the door, so had a more accurate view.

Defense counsel asked the court to inquire of the bailiff or the jurors as to what they observed. The trial court denied both requests. Defense counsel moved for a mistrial, which the court denied. Undaunted, defense counsel inquired whether he could question the sheriffs who were standing next to appellant in lock-up. The court denied that request. Appellant next requested that he be allowed to question the jurors as to what they witnessed. The court pointed out that this could serve no useful purpose because it would call attention to the very fact to which counsel was objecting.

On appeal, appellant argues that the court had information that the jury was exposed to a "potentially prejudicial situation." He contends that the potential jurors were unaware of his custody status and "[v]iewing him being led into the courtroom in chains could have significantly and prejudicially impacted their ability to be fair." He asserts that the court's failure to conduct a hearing to determine whether the jurors saw him in custody was prejudicial and requires reversal.

At the outset, we observe that appellant is stating facts that are not in the record. There was no evidence that he was shackled, handcuffed or wearing jail attire, or that he stepped into the courtroom. If he was seen at all, it was through a partially open door, standing behind a bailiff.

We review the trial court's denial of a mistrial motion for an abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 128.) The court must grant a motion for mistrial when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Avila* (2006) 38 Cal.4th 491, 573.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*Ibid.*)

The trial court indicated on the record that the door was only partially open and that appellant was behind the bailiff and could not be seen by

the potential jurors. It did not abuse its discretion in denying the motion for a mistrial or appellant's request for an evidentiary hearing.

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Robert J. Schuit, Judge
Superior Court County of Los Angeles

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for Defendant and Appellant.

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